

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

57
Affidavit

77-6022

To be argued by
ROBERT B. FISKE, JR.

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-6022

UNITED STATES OF AMERICA

by DOROTHY S. GREENBERG, for herself as well as for the
of America,

Plaintiff-Relator-Appellant,

—against—

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED,
BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTH-
HOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST
SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS
J. KULUKUNDIS, SUMMIT MARINE OPERATIONS, INC., SUMMIT I
INC., SUMMIT II, INC., SUMMIT III INC., CHEROKEE I SHIPPING
CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE
III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORA-
TION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPOR-
TATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME
SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT
INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BUL-
LITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC.,
GENERAL AMERICAN TRANSPORTATION CORP., GENERAL DYNAM-
ICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMAR-
LEASE (BURMAH LNG CARRIER), INC., CITIMARLEASE (BURMAH
LIQUEGAS), INC. and CITICORP.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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Defendants-Appellees.

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

Preliminary Statement

Dorothy Greenberg (the "Relator") appeals from an Order and Judgment of United States District Judge Whitman Knapp, entered on January 10, 1977, dismissing

for lack of jurisdiction an action brought by the Relator in the name of the United States of America (the "United States") pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 232. The dismissal resulted from a motion made by the United States, pursuant to a special appearance, to dismiss the complaint for lack of subject matter jurisdiction under 31 U.S.C. § 232(C), because, in the words of the statute, the suit "was based upon evidence or information in the possession of the United States . . . at the time the suit was brought." The Order and Judgment is predicated upon the Memorandum and Order of the District Court dated and filed December 22, 1976.

Issues Presented

1. Did the District Court properly conclude that the information on which the suit was based was in the possession of the United States at the time the suit was filed?
2. Was the United States' motion timely and properly made?

Statement of the Case

This action concerns applications made to the Maritime Administration ("MarAd") for construction differential subsidies ("CDS") pursuant to Title V of the Merchant Marine Act of 1936, as amended, 46 U.S.C. § 1151-1161, and for federal guarantees of debt obligations pursuant to Title XI of the same act ("Title XI guarantees"), 46 U.S.C. § 1271-1280.

CDS represents payments to United States shipyards of the difference in cost between having a ship built in the United States as opposed to a foreign country. Title XI

guarantees are full faith and credit guarantees by the United States of debt obligations issued for the purpose of financing the construction or reconstruction of vessels in United States shipyards. The primary purpose of these programs is to promote the growth, maintenance, and modernization of the United States merchant marine. Under both programs, the vessels must be registered under the United States flag, have American crews and use American-made parts to the greatest extent possible.

There are two separate sets of applications which are the subject of Relator's complaint: (1) applications of defendants-appellees Cryogenic Energy Transport, Inc., Liquegas Transport, Inc., and LNG Transport, Inc., (the "Cryogenic Corporations") for CDS and Title XI guarantees for three ships and (2) applications of five corporations, defendants-appellees Cherokee I Shipping Corporation through Cherokee V Shipping Corporation (the "Cherokee Corporations"), for Title XI guarantees for an additional five ships.*

The Merchant Marine Act requires that applicants for CDS and Title XI guarantees must be United States citizens as defined in the act, 46 U.S.C. § 1244, which incorporates the definition contained in § 2 of the Shipping

* Although the Relator's claims are based principally on the Title XI applications of the Cherokee Corporations, those applications, as well as the Title XI applications of the Cryogenic Corporations, cannot form the basis for an action under the False Claims Act unless and until there has been a default in the loans subject to the federal guarantee. *United States v. McNinch*, 356 U.S. 595, 598-600 (1958). None of the Cryogenic or Cherokee Corporations' loans has ever been in default, so the District Court would, in any event, have lacked jurisdiction over such claims.

Act of 1916, as amended, 46 U.S.C. § 802.* The Relator's complaint alleges that the applications of the Cryogenic and the Cherokee Corporations violated the citizenship requirements and that the applications constituted false claims under the False Claims Act, 31 U.S.C. §§ 231 *et seq.*

The action was filed on September 30, 1976, and the Relator, pursuant to the requirement of 31 U.S.C. § 232 (C), then served her complaint upon the United States Attorney for the Southern District of New York and mailed to the Attorney General a copy of the set of documents

* Section 2 of the Shipping Act of 1916 provides in relevant part:

"(a) Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof

"(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States."

upon which she based her action. These documents, collectively denominated Schedule A to the complaint ("Schedule A") (A. 28-262),* were received by the Department of Justice on October 4, 1976 (A. 497). On December 2, 1976, the United States entered a special appearance solely in order to move to dismiss the complaint for lack of subject matter jurisdiction on the ground that the information upon which the suit was based was in the possession of the United States at the time the action was brought.

On December 22, 1976, the District Court rendered its Memorandum and Order, granting the United States' motion (A. 575-579).

The District Court found that the allegations of fraud asserted by the Relator were a matter of widespread knowledge well before the Relator commenced this action, including having been the subject of numerous newspaper articles. The Court found that an inquiry concerning the allegations had been commenced by Congressman Les Aspin in March 1976—more than six months before Relator's action was brought—and that, in August 1976, he had referred the matter to both the House Committee on Government Operations and the Justice Department. The Court further found that, in early September, the Securities and Exchange Commission had commenced an inquiry concerning the underlying corporate transactions.

With respect to the documents supplied to the Justice Department by the Relator, the District Court found that "with possibly one exception those documents, or the information contained in them, were within the actual pos-

* "A." refers to pages of the "Joint Appendix" filed by the Relator in connection with this appeal.

session of one or another government body before the complaint was filed" (A. 576).*

The Court, for the purpose of the motion, assumed *arguendo* that because of Relator's allegations of complicity on the part of MarAd, the information in its possession should be disregarded.** However, the District Court found that the fact that the identical information was in the possession of the House Committee was sufficient to invoke the jurisdictional bar.

With respect to the three-page memorandum which is Item 2 of Schedule A (the "Kurrus Memorandum"), a document the government did not possess, the District Court found that the information it contained was public knowledge, having been "specifically identified and fully described" in an article in the *New York Times* in August 1976 (A. 498-499), which article was in the files of the Justice Department prior to September 30. The District Court also found that although the Justice Department did not have the Kurrus Memorandum itself at the time Relator's complaint was filed, it "would inevitably have been acquired by the Department in the course of its investigation had it been considered important" (A. 577).

The District Court refused to accept the notion that Relator's suit should be allowed simply because, as of Septem-

* The District Court found that the "newspaper clippings" which constitute Item 6 of Schedule A (A. 155-228) were not in the possession of the House Committee, as the Realtor argued (A. 579). However, Item 6 includes a news release from the Committee itself (A. 221-223).

** As discussed at pp. 28-30, *infra*, this holding was unnecessarily generous to Relator since it is clear that at the time the complaint was filed MarAd was not in complicity with anyone except the numerous government agencies that were then investigating this matter.

ber 30, the Justice Department's investigation of the underlying information had not yet proceeded to the point where the Kurrus Memorandum had in fact been obtained by it. Reviewing the purpose of the *qui tam* provisions of the False Claims Act, Judge Knapp stated that "[t]he Act was designed to encourage citizens to come forward with information of which the Government might be ignorant. It was not designed to permit citizens to call upon the courts to supervise the manner in which the Government deals with information it already has." (A. 578).

The Order and Judgment of the District Court was entered on January 10, 1977, and this appeal followed.

Statement of Facts

1. The structure of the underlying financial transactions

The underlying financial arrangements for the construction of liquid natural gas ("LNG") tankers, for which CDS and Title XI guarantees were sought from MarAd, involve, in one capacity or another, each of the defendants-appellees. These transactions are quite complex, resulting from the need to aggregate the large amounts of capital to pay the construction costs of approximately \$100 million for each of the eight tankers ultimately contracted for.

The type of financing contemplated by these applications and which is common for items as expensive as these vessels, is called leverage lease financing. In this type of financing, as used for vessels, a group of equity investors selects a corporate owner-trustee to represent them in the purchase and subsequent chartering out of the vessels. The lease is leveraged in that the owner-trustee provides only a percentage of the capital needed to purchase the vessel, which percentage is supplied by the equity investors. The remainder is borrowed by the

owner-trustee, usually from institutional investors (A. 267).

The owner-trustee leases the vessel to a "bareboat charterer" which is responsible for hiring the officers and crew and for operating and maintaining the vessel. The bareboat charterer in turn chartered the vessel to another party under a "time charter," pursuant to which the bareboat charterer is responsible for the carriage of such cargoes as may be specified by the time charterer* (A. 268).

A. The Cryogenic applications

On July 14, 1972, the three Cryogenic Corporations filed applications with MarAd for construction differential subsidies on three LNG tankers to be built by defendant-appellee General Dynamics Corporation ("General Dynamics") at its Quincy, Massachusetts shipyard. These applications were subsequently amended on August 31, September 15, and September 20, 1972. The Cryogenic Corporations also applied, on August 31, 1972, for Title XI guarantees in connection with financing the construction costs of these vessels. These applications were amended on September 15, and September 20, 1972. MarAd approved the subsidies on September 22, 1972, and, on the same day, conditionally committed itself to granting Title XI guarantees provided that a number of conditions were met. On August 9, 1974, it formally approved the issuance of Title XI guarantees (A. 266-267).

As stated in the CDS and Title XI applications, the vessels are to be used to transport LNG from Algeria to the United States to fulfill a transportation agreement between defendant-appellee Burmah Oil Tankers Limited

* Bareboat and time charters are common arrangements in the shipping industry quite apart from the type of financing that may be involved.

("BOT")* and a joint venture, known as Easco, made up of two United States utilities, Public Service Electric & Gas Company of New Jersey and Algonquin Gas Transmission Company (A. 269).

As to the Cryogenic vessels, the owner-trustee is the Wilmington Trust Company, as trustee for the equity investors, which are First Chicago National Bank, defendant-appellee General American Transportation Company, and three subsidiaries of defendant-appellee Citicorp Leasing, Inc. At the time the CDS and Title XI applications were approved, the three Cryogenic Corporations were all wholly-owned by the Wilmington Trust Company and were thus United States citizens, in compliance with the Shipping Act. On August 9, 1974, Wilmington Trust Company entered into an agreement to bareboat charter the vessels to subsidiaries of defendant-appellee Summit Marine Operations, Inc. ("Summit")** (A. 268).

* BOT is a Bermuda corporation which is a wholly-owned subsidiary of defendant-appellee Burmah Oil Company Limited ("Burmah"), a United Kingdom corporation (A. 269). At the time the applications were filed, BOT's chief executive officer was defendant-appellee Elias J. Kulukundis (A. 273).

** The subsidiaries of Summit are defendants-appellees Summit I, Inc., Summit II, Inc., and Summit III, Inc. Summit, in turn, is a subsidiary of defendant-appellee Energy Transportation Corporation ("Energy"), a United States corporation which is owned by defendants-appellees C. Y. Chen, Joseph Cuneo, and Jerome Shelby, all of whom are American citizens.

In the original Cryogenic applications for CDS and for Title XI guarantees, Summit, as well as the Cryogenic Corporations, were listed as wholly-owned by defendant-appellee James Durbin, an American citizen who was affiliated with a number of United States subsidiaries of Burmah, as listed in the applications (A. 288, A. 290-295, A. 348, A. 351-352). On or about September 14, 1972, prior to the approval by MarAd of CDS or Title XI guarantees, Durbin transferred all of this stock in the Cryogenic Corporations to Wilmington Trust Company and all of his stock in Summit to C. Y. Chen. In or about March 1973, Chen transferred his Summit stock to Energy (A. 269-270).

On the same date as the bareboat charter agreement, the bareboat charterers entered into an agreement to time charter the vessels to defendants-appellees Bethel Marine Corporation, Southhold Marine Corporation, and Vermont Marine Corporation (the "Marine Corporations"), which are Delaware corporations that are wholly owned subsidiaries of subsidiaries of Burmah.* The Marine Corporations, also on August 9, 1974, entered into a vessel management contract with BOT under which the vessels will be used to fulfill the Easco transportation agreement (A. 268-269).

The three Cryogenic vessels are currently under construction by General Dynamics and are nearing completion. As of November 26, 1976, the aggregate construction cost paid on the vessels was \$280 million of which the United States had paid construction differential subsidies totalling \$79 million to General Dynamics. Interim construction costs, less subsidies, are being financed by a loan from defendant-appellee First National City Bank, 75 percent of which is guaranteed under Title XI and 25 percent by Burmah. Upon completion of the vessels, this interim loan will be converted into permanent financing by the sale by the Cryogenic Corporations of long term obligations for 75 percent of the actual costs of the vessels, net of CDS. These obligations will carry Title XI guarantees and the proceeds will be used to repay that portion of the loan made by First National City Bank which was guaranteed under Title XI (A. 270).

* Even though incorporated in Delaware, the Marine Corporations are not United States citizens within the meaning of §2 of the Shipping Act of 1916, 46 U.S.C. § 802, since they are subsidiaries of a foreign corporation. However, Section 37 of the Shipping Act, 46 U.S.C. § 835, permits time charters to foreigners if approved by MarAd, which MarAd has done in this instance (A. 269).

B. The Cherokee applications

On August 8, 1973, the Cherokee Corporations I through IV filed applications * for Title XI guarantees in connection with the construction of four more LNG tankers to be built by General Dynamics (A. 270). On November 7, 1973, MarAd preliminarily committed itself to granting Title XI guarantees provided that certain conditions were met (A. 456-462). On February 12, 1974, the fifth Cherokee Corporation applied for Title XI guarantees on another LNG vessel to be built by General Dynamics and on May 21, 1974, MarAd also preliminarily committed itself to granting Title XI guarantees in connection with its financing (A. 271).

The applications filed by the Cherokee Corporations contemplated leverage lease financing similar to that used in the Cryogenic transactions. The vessels were to be owned by an owner-trustee, as established by institutional investors; the trustee was to bareboat charter the vessels to subsidiaries of Energy, which would in turn time charter the vessels to United States subsidiaries of Burmah. The time charterers would enter into a vessel management agreement with defendant Burmast East Shipping Corporation ("Burmast"), a Liberian corporation, 57½ percent of whose stock was owned by BOT. Pursuant to that agreement, the vessels were to be used to fulfill a transportation agreement, dated September 23, 1973, between Burmast and Perusahaan Pertamina-bangan Minjak Dan Gas Bumi Negara ("Pertamina"),

* The original applications filed by Cherokee Corporations I through IV stated that they were owned by defendant-appellee John C. Bullitt (A. 271). The stock of the Cherokee Corporations was subsequently transferred, and, by October 11, 1973, was owned by Energy (A. 271, A. 404). The original applications were accordingly amended on October 11, 1973.

an Indonesian corporation. Under the transportation agreement, Burmast was to ship LNG from Indonesia to Japan (A. 271).

On August 26, 1976, the Cherokee Corporations, joined by General Dynamics, further amended their application to provide that, if MarAd approved the applications, General Dynamics would purchase all of the stock of the Cherokee Corporations from Energy with the result that General Dynamics would essentially occupy the place of an owner-trustee with respect to the bareboat charter and the rest of the steps in the transaction, and the Cherokee applicants for Title XI financing would all be wholly-owned subsidiaries of General Dynamics (A. 272) and thereby United States citizens, in compliance with the Shipping Act.

On January 19, 1977, after an extensive investigation by both the Maritime Administration and the Justice Department into the allegations of improper citizenship and improper control of Energy by Burmah, then-Secretary of Commerce Elliot Richardson approved the applications of the Cherokee Corporations for Title XI guarantees.* 

2. The evidence and information in the possession of the United States on September 30, 1976

The accumulation by various branches and agencies of the United States of information relating to the applications of the Cryogenic Corporations and the Cherokee Corporations for CDS and Title XI guarantees started almost four years prior to the filing of the complaint in

* See pp. 22-23, *infra*.

this action. Prior to the time the complaint was filed, the allegations it made had been the object of a lengthy article in the *New York Times* and the entire matter was being investigated concurrently by the House Committee on Government Operations, the General Accounting Office, the Department of Justice, and the Securities and Exchange Commission, as well as MarAd itself.

The initial information concerning these transactions was provided by the applicants themselves, in the various applications and amendments submitted to MarAd. Thus, from mid-1972 until early 1974, MarAd received the following documents:

(i) The original applications of the Cryogenic Corporations for CDS (July 14, 1972) (e.g., A. 280-304);

(ii) Serial amendments to the CDS applications of Cryogenic Corporations (August 31, September 15, and September 20, 1972) (e.g., A. 305-319, A. 320-325, A. 326-330);

(iii) The original applications of the Cryogenic Corporations for Title XI guarantees (August 31, 1972) (e.g., 331-369);

(iv) Serial amendments to the Title XI applications of the Cryogenic Corporations (September 15 and September 20, 1972) (e.g., A. 370-378, A. 379-383);

(v) The original applications of Cherokee Corporations I through IV for Title XI guarantees (August 8, 1973) (e.g., A. 420-455);

(vi) An amendment to the Title XI application of the Cherokee Corporations (October 11, 1973) (e.g., A. 389-419)*; and

* The applications of the Cherokee Corporations for Title XI guarantees were further amended on August 27, 1976 (A. 463-472).

(vii) The original application of Cherokee Corporation V for Title XI guarantees (February 12, 1971) (See A. 271).

These various applications set forth, in detail, the legal and financial structure of the transactions, as well as identifications and descriptions of the nationality and control of the various corporate and individual parties involved. In addition, MarAd was apprised of changes in the management and ownership of the various corporate participants in the transactions by way of the amendments to the applications. These amendments changed the structure of the transactions in a number of material respects. The statements in Relator's brief that the transactions were illegal because the applicants were controlled by Burmah, including the more than four full pages devoted to the Bullitt affidavit of citizenship regarding the Cherokee Companies, are based almost entirely on the initial applications, before the amendments were made and before MarAd had made any commitments.*

In addition to MarAd, other governmental agencies began collecting and analyzing information beginning in or about late 1974. At that time, Senator Byrd of West Virginia and officials at the White House received a complaint from a private citizen that the citizenship requirement had been violated in connection with the CDS granted to the Cryogenic Corporations, since the vessels were to be time chartered to Burmah subsidiaries (A. 277). This complaint was passed on to the Justice Department, which, through its office of Legal Counsel, responded on April 9, 1975 (A. 481-488). The Depart-

* As noted earlier the transactions were amended and restructured after the original applications were filed. At the time of final approval, the Wilmington Trust Company owned all the stock of the Cryogenic Corporations and General Dynamics owned all of the stock of the Cherokee Corporations.

ment of Justice concluded in a memorandum to the White House that the situation presented by the Cryogenic Corporations' CDS grants did not violate the citizenship provisions of the Merchant Marine Act (A. 486).

Early in 1975, a dispute arose between Burmah and Energy, which, through the Cherokee Corporations, held title to the vessels* (See A. 78-82). At that time, Burmah, in an apparent attempt to remove Energy from these transactions, brought the matter, including the citizenship allegations, to MarAd's attention. This set off a flurry of letters among the Cherokee Corporations and their parent (Energy), Burmah and its legal representatives, and MarAd.** As MarAd began to look into the matter, it sent a letter on May 1, 1975, to Energy, requesting it to respond to the allegations (A. 480). MarAd had numerous conversations with all of the parties to determine the facts, in order to assure itself of the legality of the transaction (A. 273).

* Relator's allegations regarding the control of Energy by Burmah are difficult to accept in view of the active and open dispute between the two companies. See Burmah's complaint against Energy, Item 5(b) to Schedule A (A. 144-154). Indeed, the refusal of Energy and its principal stockholder, Dr. Chen, to follow Burmah's wishes by, among other things, transferring its stock in the Cherokee Corporations to a third-party (e.g., A. 40-43; A. 80-83) led Burmah's attorney to complain to MarAd that Energy and its principals were taking actions "that appeared to be in conflict with Burmah's interest" and that they were pursuing projects independent from the Cryogenic and Cherokee transactions (A. 48).

** See, e.g., a letter to the Cherokee Corporations from Burmah, with an indicated copy to MarAd, dated April 18, 1975 (A. 475-477); a letter to MarAd from Burmah's attorney, dated April 18, 1975 (A. 473-474); a letter to Energy from Burmah, with an indicated copy to MarAd, dated April 28, 1975 (A. 478-479); and a letter to Energy from MarAd dated May 1, 1975 (A. 480).

On March 3, 1976, Congressman Les Aspin wrote to MarAd expressing concern over possible violations of the citizenship requirement by various of the participants in the Cherokee Corporations transaction. He requested that MarAd provide him with information concerning the transaction and that MarAd assure that the legal requirements for participation in the Title XI program were being met in this case (A. 489).

On April 21, 1976, MarAd responded with a lengthy letter to Congressman Aspin describing the structure of the transactions and the legal relationship of Burmah and its subsidiaries to the other parties to the various agreements (A. 489-490).

On May 25, 1976, Congressman Aspin, stating his belief that it was advisable "that an appropriate congressional scrutiny be brought to bear," referred the entire matter to the House Committee on Government Operations (A. 490-491). In his letter, Congressman Aspin specifically directed the Committee's attention to the issue of possible control of Energy by Burmah.

Thereafter, beginning in June 1976, MarAd officials met with staff members of the Committee on at least five occasions prior to the filing of Relator's complaint and explained the Cherokee and Cryogenic transactions, including the role of Burmah and its subsidiaries (A. 278).

On August 2, 1976, Congressman Jack Brooks, Chairman of the House Committee on Government Operations, requested the General Accounting Office to review the entire Title XI guarantee program being administered by MarAd (A. 222), citing allegations he had received "concerning the General Dynamics liquified natural gas tanker program." (A. 221). On August 3, 1976, Congressman

Brooks sent a similar letter to MarAd, requesting information regarding the Cherokee Corporations' Title XI applications (A. 223). As a result, during August and early September, 1976, investigators from the General Accounting Office visited MarAd and were given all of MarAd's records concerning the Cryogenic and Cherokee transactions. In addition, MarAd officials explained the structure of both transactions (A. 278).

On August 19, 1976, the *New York Times* published a lengthy article concerning the LNG tanker applications. Opening with the statement that:

"The Securities and Exchange Commission, the Federal Maritime Administration and at least one Congressional Committee are investigating whether the Burmah Oil Company . . . illegally received commitments for Federal guarantees or subsidies to build at least eight huge tanker ships in this country." (A. 498),

the article went on to discuss at length the claims that the Cherokee and Cryogenic transactions did not satisfy the citizenship requirement and that the applications to MarAd were fraudulent (A. 498-499). Later that same day, Congressman Aspin brought the *Times* article to the attention of the Department of Justice, sending as well copies of his exchange of correspondence with MarAd. Following the receipt of Congressman Aspin's letter, the Department of Justice began a review of the Cherokee and Cryogenic transactions (A. 496-497).

In addition to the investigations being conducted by the Justice Department, the House Committee on Government Operations, and the General Accounting Office, the Securities and Exchange Commission ordered an investigation of Burmah. In particular, that investigation con-

cerns Burmah's relationship to various persons and entities, including Energy and certain of its subsidiaries, involved in financing and chartering LNG vessels (A. 501-502).

On September 30, 1976, with full knowledge that the entire matter was then under investigation by at least the SEC, MarAd, and a Congressional committee, Relator commenced this *qui tam* action making the basic allegations of improper citizenship and control that had been the subject of the *New York Times* article one month earlier.*

Of the specific documents referred to in Schedule A to Relator's complaint, the House Committee had in its possession every one, except the three page Kurrus Memorandum, and three documents of no relevance to the complaint which were summarized, in any event, in another document which the Committee had.** MarAd had in its possession, or was aware of the information contained in, all of the documents. The Justice Department had the *New York Times* article, which referred to and described several of the documents contained in Schedule A, including the Kurrus Memorandum.

* Although there is no evidence that Relator knew that the Justice Department was also reviewing the matter, that would have been a logical assumption under the circumstances.

** The record is silent as to the Committee's possession of the news releases which constitute Item 6 of Schedule A. However, these releases include one from the Committee itself and the *New York Times* articles which Congressman Aspin, a member of the Committee, sent to the Justice Department. Thus, it cannot be presumed that the Committee lacked the news releases constituting Item 6.

A specific analysis submitted to the District Court by the United States reflects the following as to each of the documents in issue:

<i>Document No. (as listed on Schedule A of Relator's Com- plaint (A. 28-92))</i>	<i>United States' pos- session of the Docu- ment or the informa- tion contained therein prior to the commencement of this action</i>	<i>Joint Appendix reference</i>
1 (A. 30-46)	Document in posses- sion of Government Operations Committee of the House of Representatives (the "Committee")	A. 494
	Information in docu- ment known to MarAd	A. 276
2 (A. 47-49)	Document is memo- randum of meeting with MarAd officials, of which United States was thus aware	A. 277
	Memorandum identi- fied, described and quoted in <i>New York Times</i> article in Item 6, furnished to Depart- ment of Justice	A. 158-159; A. 496
3 (A. 50-54)	Document in posses- sion of the Com- mittee	A. 494
	Information in docu- ment known to MarAd	A. 276
4. (A. 55-124)	Document in posses- sion of the Com- mittee	A. 494
	Document shown to MarAd	A. 274

<i>Document No. (as listed on Schedule A of Relator's Com- plaint (A. 28-92))</i>	<i>United States' pos- session of the Docu- ment or the informa- tion contained therein prior to the commencement of this action</i>	<i>Joint Appendix reference</i>
5(a) (A. 125-143)	Document in possession of both the Committee and MarAd	A. 495; A. 276
5(b) (A. 144-154)	Document in possession of both the Committee and MarAd	A. 494; A. 275
6 (A. 155-228)	MarAd was aware of virtually all of the American newspaper and magazine articles included in Item 6, as well as some of the foreign articles, which essentially contain the same information as the American articles	A. 276
	Two <i>New York Times</i> articles included in Item 6 (A. 158-161) sent to the Department of Justice by Congressman Aspin	A. 496-497
7, 8(a) & 8(b) (A. 229-262)	Documents have little relevance to issues raised in this action. To the extent of their relevance, the information was furnished to MarAd by Burmah in 1975	A. 276-277
	Documents are summarized in Item 5(a) which was in possession of both the Committee and MarAd	A. 276-277; A. 495

3. Events occurring after the filing of the complaint in this action

On October 2, 1976, Congressman Aspin wrote to Secretary of Commerce Richardson questioning the legality of the pending Cherokee applications and the extent of the involvement of MarAd officials, and asking Richardson to decide himself whether these applications should be granted (A. 523-529). Mr. Richardson responded by letter dated November 17, 1976, answering some of the contentions in Congressman Aspin's letter and stating that he himself would make the final decision (A. 530-536). He wrote:

"I am aware of no evidence that any current official of MarAd has acted improperly or illegally in dealing with these applications of Title XI guarantees. It is appropriate, therefore, that MarAd continue to apply its expertise to the assessment of the General Dynamics amended application.

"On the other hand, I do believe that the question of the financing of these ships, involving as it does important ramifications for the Nation's shipbuilding capacity and overall energy policy, as well as allegations of improper corporate payment, must engage my personal attention. Final action on this matter will, therefore, be taken only with my full knowledge and approval. In addition, I have asked the General Counsel of the Department of Commerce, J. T. Smith, to continue a thorough review, already begun, of all the facts and circumstances surrounding the construction of these LNG tankers. If you wish further information on this matter, Mr. Smith would be glad to meet with you.

"In summary, we will take every feasible step to assure ourselves that all parties to this transac-

tion, who are required by law to meet the Shipping Act's 'citizenship' test, do indeed meet this test." (A. 535).

In the meantime, and independent of the Department of Commerce's investigation, the Department of Justice was continuing its investigation, prompted by Congressman Aspin's letter to it. This investigation was conducted by the office of the United States Attorney for the Southern District of New York with the assistance of attorneys from the Department of Justice in Washington. It was completed in January 1977, with the conclusion that no action for violations of the citizenship requirements or the False Claims Act was justified.

On January 19, 1977, Secretary of Commerce Richardson, based upon the conclusions of the Department of Justice's investigation and of his own investigation, concluded that the Cherokee applications were within the law and approved granting Title XI guarantees for these vessels. His approval was announced in a public statement, the full text of which is reproduced as Annex A to the brief of defendants-appellees, which concluded as follows:

"The contentions regarding improper citizenship and control in the case of these vessels have been the subject of an extensive investigation by the Department of Justice. This investigation was coordinated by the United States Attorney for the Southern District of New York, and involved staff of both the Civil and Criminal Divisions of the Department of Justice in Washington. On the basis of this investigation, the U.S. Attorney for the Southern District of New York wrote the General Counsel of the Maritime Administration on January 17, 1977 and stated:

' . . . we have concluded that the facts of which we are aware do not justify the initiation of criminal or civil proceedings for violation of the citizenship requirements or the False Claims Act.'

"We have received, in addition, new affidavits with regard to citizenship and control from all the parties to the current transaction required by law to be U.S. citizens. On the basis of these affidavits, the Maritime Administration's own legal review, and the Department of Justice's recently completed investigation, it appears not imprudent to conclude that the guarantees approved today will support a transaction that is lawful and proper under relevant statutory standards."

ARGUMENT

POINT I

The District Court Correctly Dismissed the Complaint for Lack of Subject Matter Jurisdiction Because the United States Had in Its Possession on September 30, 1976, the Information on Which this Action Is Based.

Section 232(C) of the False Claims Act provides, in relevant part:

"The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any

agency, officer or employee thereof, at the time such suit was brought" 31 U.S.C. § 232(C).

The courts have treated this provision as establishing an absolute jurisdictional bar to a *qui tam* action when the conditions of the statute are met. See, e.g., *United States ex rel. Leslie v. Potomac Electric Power Co.*, 208 F.2d 39 (D.C. Cir. 1953); *United States ex rel. Thompson v. Hays*, Civil Action No. 76-1078 (D.D.C. October 30, 1976), *appeal dismissed*, Dkt. No. 76-2151 (D.C. Cir. March 18, 1977); *United States ex rel. Martin-Trigona v. Ford*, Civil Action No. 76-1374 (D.D.C. October 28, 1976).*

The legislative history of the jurisdictional provision makes it clear that it is not limited to precluding "parasitical" actions, as Relator contends, but is intended to prevent a private suit in any situation where the Government had the essential information on which the private complaint was based. The provision was enacted as a part of the Congressional response to the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).** As initially enacted by House of Repre-

* Copies of the unpublished opinions in *United States ex rel. Thompson v. Hays*, *supra*, and *United States ex rel. Martin-Trigona v. Ford*, *supra*, are annexed to this brief as Appendices A and B, respectively.

** For the legislative history of this jurisdictional provision, which was contained in a 1943 amendment to the False Claims Act, see generally, *United States ex rel. Bayarsky v. Brooks*, 154 F.2d 344, 345-6 (3d Cir.), *cert. denied*, 329 U.S. 716 (1946); *United States v. Pittman*, 151 F.2d 851, 853 (5th Cir. 1945), *cert. denied*, 328 U.S. 843 (1946); *United States ex rel. Vance v. Westinghouse Electric Corp.*, 363 F. Supp. 1038, 1041-1042 (W.D. Pa. 1973); *United States v. Aster*, 176 F. Supp. 2008 (E.D. Pa. 1959), *aff'd*, 275 F.2d 281 (3d Cir.), *cert. denied*, 364 U.S. 834 (1960).

sentatives, the provision entirely abolished private suits for damages under the Act. See *United States v. Pittman*, 151 F.2d 851, 853 (5th Cir. 1945), *cert. denied*, 328 U.S. 843 (1946). In the Senate, the Committee on the Judiciary recommended restoration of a *qui tam* provision with the following proviso:

"That no district court of the United States shall have jurisdiction to hear, try, or determine any such suit, unless based upon information, evidence, and sources original with such person and not in the possession of or obtained by the United States in the course of any investigation or proceeding by it. . . ." S. Rep. 291, 78th Cong., 1st Sess. (1943), reproduced in U.S. Code Congressional Service 2.324-6 (1943).

In this form, the Senate passed the bill and the differing House and Senate versions were referred to a conference committee for reconciliation.* *United States v. Pittman*, *supra*.

The measure recommended by the conference committee was in the form eventually passed into law as section 232(C). The conference report, which was introduced and read in the Senate on December 15, 1943, 89 Cong. Rec. 10687-8 (1943), merely recited, without interpreting, the jurisdictional section. The consideration of the measure in the Senate the next day has been abstracted by Judge Hastie in *United States v. Aster*, 176 F. Supp. 208

* It should be noted that the Relator's extensive discussion of the legislative history of the 1943 amendments relates only to the Senate debates on the Senate version of the bill. See Relator's Br. at 42-46. The Relator says not a word about the Senate or House debates over the conference committee revision—the version that ultimately was passed.

(E.D. Pa. 1959), *aff'd*, 275 F.2d 281 (3rd Cir.), *cert. denied*, 364 U.S. 894 (1960), who noted:

"Particularly noteworthy is the debate which ensued in the Senate where Senator Langer vigorously attacked the conference compromise as practically abolishing the qui tam procedure and proposed resubmission of the matter to the conference committee with instructions that the Senate conferees insist that only the parasitical act of the relator who uses public information as the basis of his suit—the situation of *United States ex rel. Marcus v. Hess*—should be abolished. 89 Cong. Rec. 10746-51. However, *the Senate rejected this motion* and adopted the conference report. 89 Cong. Rec. 10752." *United States v. Aster, supra*, 176 F. Supp. at 209-10 (emphasis supplied).

The court decisions which have interpreted the provision confirm that it was intended to bar all suits where the United States had the essential information at the time the suit was filed, and not just "parasitical" suits.* In *United States ex rel. Vance v. Westinghouse Electric Corp.*, 363 F. Supp. 1038, 1042 (W.D. Pa. 1973), the court stated the general rule under the statute, as follows: "[S]uits by informers are barred where the essential information upon which they are based is already in the hands of the government regardless of the government's source of information." This followed the deci-

* Even if the statute were found to bar only "parasitical" suits, the action by the Relator must surely fall into that category. Virtually all of the material allegations of Relator's complaint are taken from the 63-page memorandum prepared for Burmah by its counsel, which was in the possession of the House Committee on Government Operations prior to the filing of the Relator's complaint (A. 494).

sion of Judge Hastie in *United States v. Aster, supra*, in which a private suit was dismissed upon a finding that "the essential information upon which the present suit is predicated was supplied to and was in the possession of the United States before this suit was filed." 176 F. Supp. at 209. See also *United States ex rel. Thompson v. Hays, supra*, at p. 6 n. 3 ("[T]he possession of the crucial evidence or information by the government prior to initiation of suit by the relator is an absolute jurisdictional bar to the relator's going forward with the action.") Cf. *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144, 1152 (S.D. Cal. 1976) (dictum statement that private suit is permitted where plaintiff possesses and turns over to the Government original information).

In this case, it is clear that the United States possessed not only the essential information upon which the Relator's complaint was based, but all of that information.

As reflected in the table on pp. 19-20, *supra*, and as Judge Knapp found, the United States, and particularly the House Committee on Government Operations, was in possession of all the essential information contained in the documents in Schedule A (A. 577). This finding, as supported by the record in this case, cannot be said to be "clearly erroneous." See Fed. R. Civ. P. 52(a); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395 (1948). Specifically, the Committee had all of the documents themselves except the Kurrus Memorandum and three other documents—irrelevant to Relator's complaint—which were summarized in a document the Committee did have. In addition, the record reflects that the basic information possessed by the Committee was all known to MarAd as well, either by possession of the documents themselves or because the information in the documents had been given to MarAd officials by one or another of the defendant corporations. The record shows that MarAd had given

to the General Accounting Office "all of MarAd's records concerning the Cryogenic and Cherokee transactions" prior to the filing of Relator's action (A. 278). Also, Congressman Aspin's letter to Congressman Brooks, dated May 25, 1976, reveals that Congressman Aspin himself was in possession of substantial information concerning the alleged fraud (A. 490-491).

The only relevant document which, as of September 30, 1976, was not physically in the possession of an agency of the Government was the Kurrus Memorandum, Item 2 to Schedule A. However, the essential information contained in the Kurrus Memorandum was contained in Items 1 and 4 of Schedule A, already in the possession of the House Committee, and in the August 19, 1976, *New York Times* article, which Judge Knapp found had "specifically identified and fully described" the Kurrus Memorandum (A. 577).*

In her brief, the Relator points to the Kurrus Memorandum for only one allegedly essential item of information which she claims was not publicly disclosed in the *Times* article, the alleged complicity of MarAd in the alleged fraud (Relator's Br. at 29). However, the *Times* article specifically set forth this allegation. It stated that the documents obtained by it, including the Kurrus Memorandum, "indicate that officials of the Mari-

* As a result of the publication of the *New York Times* article, Judge Knapp found that the information contained in the Kurrus Memorandum was "public knowledge". Since the article was in the files of the Justice Department (A. 496), Judge Knapp found that "[t]he information was therefore in the Department's possession, and the memorandum would inevitably have been acquired by the Department in the course of its investigation . . ." (A. 577). This latter point is underscored by the apparent ease with which the Relator, without resort to legal process, acquired the Kurrus Memorandum, an internal document to Burmah from its attorney.

time Administration may have been aware that violations of Federal law might have been committed in connection with the Burmah guarantees and subsidies." (A. 499). The only paragraph in Relator's complaint which alludes to MarAd's role in the alleged wrongdoing does not even go as far as the *New York Times* statement. It alleges merely that "The MarAd Administration . . . have closed their eyes to the realities of the arrangements and have permitted the defendants to proceed as alleged herein . . ." (A. 21).

Relator clearly recognizes the irrelevance of the complicity charge, since her complaint in no way charges MarAd with any kind of complicity. Indeed, MarAd is not even named as a defendant in the complaint. Under these circumstances, it is difficult indeed to conceive how Relator can contend that the Kurrus Memorandum contained any information essential to the claims made in Relator's complaint beyond the information already disclosed in the *Times* article; or how, in the words of the statute, her suit was "based upon" any undisclosed information in the Kurrus Memorandum.*

In any event, the only statement in the Kurrus Memorandum cited by Relator for her claim of "complicity" on the part of MarAd is the statement that Administrator Blackwell allegedly "recognized" that the leverage leasing structure which MarAd had approved "in this deal (and in other similar deals such as Maritime Fruit Carriers,

* MarAd's alleged "complicity" has absolutely no bearing on a cause of action brought pursuant to the False Claims Act. If the citizenship requirements of the Shipping Act were in fact met, then any allegation of complicity would fall; if they were not met, the claim made by Relator would be established, whether MarAd was in complicity or not.

Ultramar, Shell, A. J. Chandris etc.) was based on a fiction" and that was "what worried him about full fledged legal controversy between Burmah and Energy." (A. 49). The "fiction" allegedly referred to was the role of foreign citizens as time charterers in the leveraged leasing transaction. However, this had been specifically approved in the opinion of the Department of Justice given to the White House (A. 481-488).

The only significance of Relator's allegation of complicity on the part of MarAd is the effect it had in inducing the District Court not to consider the information in the possession of MarAd in determining whether the jurisdictional requirements of 31 U.S.C. § 232(C) had been met. Even this decision was overgenerous to Relator since it is clear that by September 30, 1976, the key date for the purpose of the jurisdictional provision, MarAd was not in complicity with anyone, as Secretary Richardson confirmed by his November 17 finding that "I am aware of no evidence that any current official of MarAd has acted improperly or illegally in dealing with these applications for Title XI guarantees." (A. 535).

Finally, the Relator claims that her suit should be reinstated because she has performed a "public service" in assembling and analyzing the information and reducing it to a complaint (A. 35-36). The statute, however, refers only to the possession by the United States of "evidence or information"; it sets forth no further standard. The United States is thus not required to have analyzed or acted upon the information, only to have it in its possession. Cf. *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546, 549 (D.D.C. 1956), *aff'd per curiam*, 254 F.2d 90 (D.C. Cir.), *cert. denied*, 358 U.S. 834 (1958) (contention that information "had to

be pointed out or analyzed to make it of value to the United States" held not to be within a literal reading of § 232(C)).

In any event, the Relator's claim in this case is baseless. This is hardly a case, as the Relator would paint it, of the Government possessing a dispersed set of apparently innocuous facts which, when pieced together, show a false claim. Rather, the Government not only knew the essential facts, but possessed the 63-page memorandum (Item 4 of Schedule A), which both sets forth all of the factual allegations later made by Relator, and further, states in detail how the law has allegedly been violated.

The fact that Relator filed her action while the Government's own investigation was in progress—and three months before that investigation led it to conclude there was no justification for such a lawsuit—clearly does not meet the jurisdictional requirements of the *qui tam* statute. As Judge Knapp found:

"The Act was designed to encourage citizens to come forward with information of which the Government might be ignorant. It was not designed to permit citizens to call upon the courts to supervise the manner in which the Government deals with information it already has." (A. 578).

POINT II

The Motion of the United States Was Timely and Properly Made.

The Relator objects that the special appearance of the United States in this action was procedurally improper and that it was untimely under the False Claims Act. It is clear from the face of the statute that the argument regarding the timeliness of the United States' appearance in this action is irrelevant. The sixty-day time limitation

constrains an appearance by the United States only in that situation where it wishes to carry on the suit in lieu of a relator. See 31 U.S.C. § 232 (C). That is not the situation here. Indeed, the United States has determined *not* to prosecute the suit, so the sixty-day time limitation is irrelevant. In any event, the record reflects that the Department of Justice did not receive the materials in Schedule A until October 4, 1976 (A. 497). The appearance of the United States, on December 2, 1976, occurred fifty-nine days thereafter.

There is, however, a more fundamental answer to Relator's claim. The United States appeared in this suit for one purpose only, to challenge the jurisdiction of the Court below. For that purpose, the False Claims Act contains no time limitation; the court loses jurisdiction "*when-ever* it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought" 31 U.S.C. § 232 (C) (emphasis supplied). The Federal Rules of Civil Procedure are to the same effect. Fed. R. Civ. P. 12(h)(3). Accordingly, Relator's objection to the timing of the appearance by the United States is without merit.

The Relator further argues that the device of a "special appearance" is improper. Rule 12(h)(3) the Federal Rules of Civil Procedure provides: "Whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (Emphasis supplied). Thus, whether before issue is joined or after, and whether raised by a party or not, a court must decide a challenge to its jurisdiction however raised, because of the substantial nature of the question:

"There can be little doubt that a district court should be alert to terminate an action under Rule 12(h)(3) when lack of subject matter jurisdic-

tion becomes apparent. Judicial resources are precious, particularly in view of the courts' steadily burgeoning caseload, and they should not be dissipated in futile proceedings. Indeed, the lack of jurisdiction is so fundamental a defect that the rule permits a judge to recognize it *sua sponte* at any time." *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 979 (2d Cir. 1975).

Special appearances by the United States have been upheld in *qui tam* suits such as this as an appropriate method for raising the jurisdictional issue. See *United States ex rel. Thompson v. Hays*, *supra*; *United States ex rel. Martin-Trigona v. Ford*, *supra*; *United States ex rel. Sherr v. Anaconda Wire & Cable Co.*, 57 F. Supp. 106, 107 (S.D.N.Y. 1944), *aff'd*, 149 F.2d 680 (2d Cir.), *cert. denied*, 326 U.S. 762 (1945). Cf., *United States v. Baker-Lockwood Mfg. Co.*, 138 F.2d 48, 51 (8th Cir. 1943), *vacated and remanded*, 321 U.S. 744, 746 (1944) ("The United States is not only a party on the record in the . . . suit, it is a real party in interest, and, as such, we think it has the right to appear and be heard in the protection of its interests.').

The need for such a procedure is highlighted by the situation in *United States ex rel. Vance v. Westinghouse Electric Corp.*, *supra*. In that case, the defendant raised the defense of lack of jurisdiction. However, it was able to show only that the Government had in its possession bills, invoices, contracts, and related documents presumably supplied to the Government by the defendant. The defendant was unable to show the extent to which a Government audit had disclosed information relating to the alleged fraud. In denying the motion to dismiss, the court stated:

"It may be that at a later date it will appear more clearly that the government did explore everything there was to be found out about these

bills and claims presented to it in connection with this project and that the suit is based on the facts so developed. If so, we will have to determine at that time that we have no jurisdiction to proceed further with this action." *United States ex rel. Vance v. Westinghouse Electric Corp.*, *supra*, 363 F. Supp. at 1045.

Without question, the United States is in the best position to inform the Court as to the information it did and did not have at the time the suit was brought. The employment of a special appearance by the United States is, it is submitted, a necessary and salutary way to develop fully the factual issues upon which the jurisdictional determination must be based, as well as an appropriate method of permitting the United States "to appear and be heard in the protection of its interests." *United States v. Baker-Lockwood Mfg. Co.*, *supra*.

CONCLUSION

The decision of the District Court should be affirmed.

Dated: New York, New York
April 29, 1977

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1078

UNITED STATES EX. REL. EDWARD THOMPSON,
Plaintiffs,

—v.—

WAYNE HAYS, et al.,
Defendants.

Civil Action No. 76-1132

UNITED STATES EX REL. ANTHONY D. CENNAMO, et al.,
Plaintiffs,

—v.—

ELIZABETH L. RAY, et al.,
Defendants.

Civil Action No. 76-1140

UNITED STATES EX REL ANTHONY R.
MARTIN-TRIGONA, et al.,
Plaintiffs,

—v.—

WAYNE L. HAYS, et al.,
Defendants.

Memorandum Opinion

Relators in these actions seek to recover under the False Claims Act, 31 U.S.C. §§ 231-32, funds alleged to have been wrongfully claimed from the government by Congressman Wayne Hays and several persons associated

Appendix A—Memorandum Opinion

with him. The alleged misdeeds upon which the actions are based were first made public in the May 23, 1976 edition of the *Washington Post*. The front-page newspaper article detailed the relationship between defendant Hays and defendant Elizabeth Ray, whom Hays had hired as a secretary at a salary of \$14,000 per year. The newspaper contended that Ray did no secretarial work and was, in fact, Hays' mistress; subsequent articles implicated defendants Kenneth Gray and Donald Gosny in the alleged misuse of government funds. The separate complaints in these cases were filed (1) by relator Thompson on June 16, 1976, (2) by relators Cennamo and Douglas on June 18, 1976, and (3) by relator Martin-Trigona on June 21, 1976. On August 19, 1976, the United States made a special appearance in the case and moved to consolidate the three cases for a hearing on the common question of the jurisdiction of the court over the actions. At the same time, the United States moved to dismiss the cases on the ground that the court was deprived of subject matter jurisdiction by the terms of the False Claims Act.¹

The False Claims Act creates civil liability in persons making claims against the government knowing such claims to be "false, fictitious, or fraudulent." 31 U.S.C. § 231. The controversy in this action arises from the so-called *qui tam* provision of the Act, which allows suits against such persons to be "brought and carried on by any person, as well for himself as for the United States . . . in the name of the United States." *Id.* § 232(B).

¹ In addition to the United States' motion to dismiss, all defendants have moved to dismiss on the same ground; defendants have also moved to dismiss counts of relator Martin-Trigona's complaint not based on the False Claims Act on the ground that he lacks standing to pursue those claims.

Appendix A—Memorandum Opinion

Whenever such suit is initiated by a private citizen, the plaintiff must serve the Attorney General of the United States with a copy of the complaint and "a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit." *Id.* § 232(C). Subsequent to receiving this information, the United States has sixty days in which to decide whether it will carry on the suit. If it declines to do so, the private plaintiff may proceed to litigate the action. The United States bases its motion to dismiss on the provision of § 232(C) that "[t]he court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer, or employee thereof, at the time such suit was brought." Thus, the sole question faced by the court on this motion is whether the United States was in possession of the information or evidence upon which the suits are based prior to their initiation by the relators.

In support of its motion to dismiss, the United States has submitted the sworn affidavit of Robert Ashbaugh, an attorney in the Frauds Section of the Civil Division of the Justice Department. Mr. Ashbaugh has been assigned responsibility for the civil consequences and liabilities arising from the Hays-Ray relationship and related matters and is, therefore, qualified to comment upon the Justice Department's activities in this area. According to his affidavit, the official records of the Justice Department reveal that the Department first obtained information regarding the claims made in this action on May 23, 1976, as a result of the *Washington Post* article. Within twenty-four hours, the Federal Bureau of Investigation had begun an investigation at the direction of the Justice Department. By May 27, 1976, a federal

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grand jury, sitting in the District of Columbia, had been convened and had issued a subpoena to the Clerk of the House of Representatives for the production of payroll records for certain congressional employees, including Elizabeth Ray. Newspaper articles reporting alleged irregularities involving the employment of defendant Gosny by defendant Hays and defendant Ray by defendant Gray appeared prior to the initiation of suit by these plaintiffs. Presumably the Justice Department also included these persons in the scope of its investigation.

In accordance with the terms of the Act, the Justice Department requested that the relators disclose in writing "substantially all evidence and information" in their possession which was relevant to the effective prosecution of the action. Responding to this inquiry, relator Thompson indicated that his information was based on conversations with persons whose names he either could not remember or could not disclose and on "various reports in the newspapers and television." He added that "[m]uch of my information and allegations are based on information and belief, as I have not done, and am not in a position to do, an intensive investigation of these allegations on my own." Relators Cennamo and Douglas purported to include with the complaint which was served upon the Attorney General "a disclosure in writing of substantially all evidence and information in our possession that is material to the effective prosecution of the suit," but the only materials enclosed were a photocopy of the cover of *The Washington Fringe Benefit*² and an

² Included in the complaint of relators Cennamo and Douglas is the allegation that Dell Publishing Company, publisher of Elizabeth Ray's novel *The Washington Fringe Benefit*, conspired

[Footnote continued on following page]

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article from *Time* magazine entitled "Sex Scandal Shakes Up Washington." Relator Martin-Trigona, through his attorney, responded to the Justice Department inquiry by disclosing that all the evidence and information in his possession was obtained from three sources: "1) the Report of the Clerk of the House of Representatives of the United States, July 1-December 31, 1975, House Document Number 94-384; 2) newspaper sources including the Washington Post and the New York Times; and 3) conversations with individuals who are unwilling to have their identities disclosed." This correspondence between the relators and the Justice Department is appended to the United States' motion. In his affidavit, Mr. Ashbaugh states, "To the extent that it is specific or reasonably identifiable, the information provided by the relators in their statements of material evidence was known to me and other Department officials prior to receipt of the transmittal letters and prior to the filing of the three *qui tam* actions here relevant."

It thus appears beyond dispute that the evidence and information upon which relators' suits were based was in the possession of the United States prior to the initiation of the suits. All of the evidentiary material which relators are able to identify specifically seems to have been gleaned from sources in the news media which received widespread public attention. The record is clear that the Justice Department was not only in possession of the same information but had in fact acted upon it

with defendants Hays and Ray to defraud the United States by obtaining the copyright on the novel. Apparently their theory is that the proceeds from the book should go to the United States since the book was composed on government time and based on defendant Ray's experiences as a government employee. Accordingly, among the relief sought in their complaint is a declaration that all compensation from the copyrighted materials be held in trust for the United States.

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prior to the filing of complaints by relators. The fact that the Justice Department had already initiated its investigation is reflected in the undisputed assertions by Mr. Ashbaugh that both the F.B.I. and a federal grand jury began to investigate the matter in May, well before the first complaint was filed by relator Thompson on June 16. Relators do not attempt to refute any of the assertions of Mr. Ashbaugh to the effect that their evidence was possessed by the United States prior to filing of their suits. In such circumstances, it is clear that this court is deprived of jurisdiction to proceed with the actions and that they must be dismissed. See *United States v. Aster*, 176 F. Supp. 208 (E.D. Pa. 1959), *aff'd*, 275 F.2d 281 (3d Cir. 1960); *United States ex rel. McCans v. Armour and Co.*, 146 F. Supp. 546 (D.D.C. 1956), *aff'd*, 254 F.2d 90 (D.C. Cir. 1958) (per curiam).³

In an effort to avoid a holding that the court has no jurisdiction in these cases, relators have raised a number of objections to the procedure employed by the United States in moving for dismissal. Relators Cennamo and Douglas urge that the United States did not act within the sixty days specified by statute and that it is therefore precluded from entering the case. Under § 232(C) the United States must act within sixty days of service

³ Relators attempt to distinguish these and other cases dealing with the jurisdictional provision of § 232(C) by noting that the earlier cases featured different factual and procedural postures from the instant case. Admittedly, the circumstances in the earlier decisions were not identical to this case, but all those decisions clearly stand for the proposition that the possession of the crucial evidence or information by the government prior to initiation of suit by the relator is an absolute jurisdictional bar to the relator's going forward with the action. Nothing in the facts presented here serves to abrogate the holdings of the prior case law.

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upon the Attorney General as described in that section, but the sixty-day period does not begin to run until service has been effected in the prescribed manner. In other words, the United States has sixty days from the time when the relator serves the Attorney General with a copy of the complaint and a disclosure in writing of the evidence and information in his possession which are material to the effective prosecution of the case. Although the action was filed by relators Cennamo and Douglas on June 18, 1976, the papers were not received by the Justice Department until June 22, 1976, as indicated by the dated file stamp on the papers which were served on the Attorney General. The special appearance of the United States was made on August 19, 1976, which is within sixty days of June 22. Relators Thompson and Martin-Trigona were even later than June 22 in complying fully with the provisions for service upon the Attorney General found in § 232(C).¹

Relator Thompson questions whether the United States can make a "special appearance" only for the purpose of moving to dismiss the action. He argues that the False Claims Act envisions that the United States will either take over the prosecution of the case or allow the relator to proceed with its prosecution. While the statute speaks only of the United States making an "appearance" and does not expressly provide for a "special appearance," such a special appearance does not seem inconsistent with the purposes of the Act, at least in the circumstances now before the court. By making a special

¹ Relator Thompson did not fulfill the statutory requirement of disclosing to the Attorney General substantially all of the evidence or information on which he relied in initiating suit until his letter of July 19, 1976. Counsel for relator Martin-Trigona disclosed his information in a letter of August 6, 1976.

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appearance, the United States can raise the issue of jurisdiction without committing itself to prosecution of the case at this time while the criminal investigation is still underway. As the United States has cogently argued, the determination of whether the court has jurisdiction cannot be readily made without its participation because that determination requires a comparison of what the relator knew about the case and what was already known by the United States. Even if the United States were not entitled to enter a special appearance for the purpose of moving for dismissal, such a motion would still be before the court since defendants Hays, Ray, Gray and Gosny have all moved to dismiss, based on the absence of subject matter jurisdiction. Furthermore, even if none of the parties had moved to dismiss on jurisdictional grounds it is the obligation of the court to raise the issue *sua sponte* whenever it appears that subject matter jurisdiction may be lacking. See Rule 12(H)(3), *Federal Rules of Civil Procedure*.

Relator Thompson further alleges that the action of the Justice Department in moving to dismiss his complaint, a complaint brought by a black man against a white member of Congress, smacks of racial discrimination in that the Department did not so move in another recent case brought under the Act, *United States ex rel. Hollander v. Clay*, Civ. No. 76-493 (D.D.C., filed March 26, 1976). The defendant in that action is a black Congressman, and the relator is a white law student. This contention provides no defense to a motion to dismiss in the face of the plain command of the Act that "[t]he court shall have no jurisdiction to proceed with any such suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States or any agency, officer or em-

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ployee thereof, at the time such suit was brought." 31 U.S.C. § 232(C). If relator Thompson can establish that the Justice Department acted on the basis of some impermissible motive such as racial discrimination, he may be able to obtain appropriate relief in another lawsuit, but his claim of racial discrimination is not sufficient to confer subject matter jurisdiction upon the court in this case when the terms of the Act itself clearly state that the court "shall have no jurisdiction" in the circumstances here presented.

Finally, relator Martin-Trigona objects to dismissal of the entire action on jurisdictional grounds since only one of the six counts in his complaint is predicated on the False Claims Act. He contends that, even if the motions to dismiss made by the United States and by defendants are granted, the other counts, based on alleged violation of various federal statutes, should survive. Defendants, however, have also moved to dismiss these remaining counts on the ground that relator Martin-Trigona lacks standing to pursue them. The only assertion made by relator Martin-Trigona regarding his standing to bring such claims is that he is a federal taxpayer. The Supreme Court had announced a two-pronged standing test for plaintiffs suing in their capacity as federal taxpayers: (1) The suit must challenge an enactment under the taxing and spending clause of Art. 1, § 8, of the Constitution; and (2) it must claim that the challenged enactment exceeds specific constitutional limitations imposed on the taxing and spending power. *United States v. Richardson*, 418 U.S. 166, 173 (1974); *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). Relator Martin-Trigona's remaining five counts fail to satisfy this test; they have nothing to do with legislation passed pursuant to the taxing and spending power of the Con-

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gress, but only with the misuse of government funds by a single member of Congress. Those counts must, therefore, be dismissed along with the action under the False Claims Act for failure of relator Martin-Trigona to establish standing as a federal taxpayer. It is well settled that federal courts do not provide a forum for the sort of "generalized grievances about the conduct of government" which are embodied in those counts. *Flast v. Cohen*, *supra*, 392 U.S. at 106.

In making the motion to dismiss, the United States contends that it is merely deferring a decision as to whether or not defendants should be sued for the false claims which they allegedly made against the government. The United States claims that prosecution for civil liability at this time is premature and could interfere with any criminal investigation of defendants' activities. Furthermore, the United States fears that litigation by the relators, with the evidence and information which they currently possess, could result in an adverse decision collaterally estopping the Justice Department in any future litigation against defendants. These are compelling arguments based on sound principles of the administration of justice, and there is nothing in the record to suggest that the United States has any ulterior motive in moving for dismissal at this time. In any event, the court is bound by the plain language of the statute depriving the court of subject matter jurisdiction where, as here, the information and evidence upon which the suits were based was already in the possession of the United States prior to the suits' initiation.

An appropriate order accompanies this Memorandum Opinion.

/s/ THOMAS A. FLANNERY
United States District Judge

Dated: 10-26-76

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 76-1374

UNITED STATES OF AMERICA ex rel.
ANTHONY R. MARTIN-TRIGONA,

Plaintiff,

—v.—

GERALD R. FORD, et al.,

Defendants.

Memorandum and Order

Plaintiff Martin-Trigona brings this action to recover, on behalf of the United States, public funds for the presidential campaign received by defendants allegedly in violation of the False Claims Act, 31 U.S.C. § 231-5, and in violation of 31 U.S.C. § 529 which prohibits unauthorized advances of public monies. This matter is now before the Court on the United States' motion to dismiss for lack of jurisdiction and lack of standing, and plaintiff Martin-Trigona's opposition thereto.

This Court has no jurisdiction over private suits to enforce the False Claims Act when the suit is "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof . . .", 31 U.S.C. § 232(C). This limitation was imposed in 1943 because many people have "no information or facts of their own, but prepare and file complaints which obviously are based on information and alleged

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facts obtained bodily from indictments returned in United States courts, from newspaper stories, and congressional investigations." *United States ex rel. Sherr v. Anaconda Wire & Cable Co.*, 57 F. Supp. 106, 108 (S.D.N.Y. 1944), *aff'd*, 149 F.2d 680 (2nd Cir. 1945), quoting majority report of the Senate Judiciary Committee. All plaintiff's information here comes from the Federal Election Commission and from a newspaper article which had been examined by the Commission *aff*. In fact, this same information led to an affirmative complaint which was filed at the same time as this action and is now pending before the Commission. Plaintiff here alleges no facts or information not otherwise known to the Government and in its possession. Neither did he make the Government more aware of the value of the information already possessed. Thus, this Court has no jurisdiction under the False Claims Act. *United States ex rel. McCans v. Armour & Co.*, 146 F.2d 546 (D.D.C. 1956), *aff'd*, 254 F.2d 90 (D.C. Cir. 1958) (*per curiam*).

Plaintiff alleges that public monies were advanced to defendant Gerald R. Ford in violation of 35 U.S.C. § 569. Plaintiff does not have statutory standing to press this claim, and must seek standing as a taxpayer. However, this is foreclosed by the recent ruling of the United States Court of Appeals for the District of Columbia in *Public Citizens, Inc. v. Simon*, No. 74-2025 (D.C. Cir., June 25, 1976).

The motion of the United States to dismiss this action must be granted but without prejudice to its right to assert these allegations in its own behalf.

The complaint is dismissed.

SO ORDERED.

/s/ GERHARD A. GESELL
United States District Judge

October 28, 1976.

